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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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Dated, New York, December 1, 1943.

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Opinion Below

There was no opinion written in the United States District Court, Southern District of New York, where the case was commenced and tried. The majority and dissenting opinions of the United States Circuit Court of Appeals for the Second Circuit are reported in 136 F. (2d) 394 and are printed in the record at pages 46 to 58 inclusive.

Jurisdiction of this Court

This is a review of a judgment of the Circuit Court of Appeals for the Second Circuit (R. 59) entered

June 24, 1943, affirming a judgment of conviction of the United States District Court for the Southern District of New York, wherein petitioner was found guilty of the offense of having used the mails in aid of a scheme to defraud, and was sentenced to a term of imprisonment for a period of five years with five years probation thereafter (R. 8). The petition for a writ of certiorari to the said Circuit Court of Appeals for the Second Circuit was filed July 23, 1943, and certiorari was granted October 11, 1943 (R. 62).

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code as amended.

Specification of Errors

The Circuit Court of Appeals erred:

> (1) Petitioner's constitutional right against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States was violated by the admission in evidence, as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York; and the Circuit Court of Appeals erred in sustaining this violation.

This error was assigned in the petition for the writ of certiorari and the order of this court allowing certiorari, filed October 11, 1943, granted the petition "limited to the question whether petitioner's testimony given in the New York supplementary proceedings was properly admitted in evidence at the trial" (R. 62).

History of Case

Petitioner was indicted in the United States District Court for the Southern District of New York on August 20, 1940, charged with the offense of having used the mails in aid of a scheme to defraud (R. 1-7).* The case was tried before Hon. Bascom Deaver, District Judge of the Middle District of Georgia, sitting temporarily in New York, and a jury, from June 22, 1942 to July 8, 1942. Petitioner was found guilty and was sentenced on July 9, 1942, to a term of imprisonment of five years and five year probation thereafter (R. 8). The sentence of imprisonment of five years was the maximum sentence that could be imposed on any one count in the indictment. Application for bail was denied and the petitioner was thereupon and has since been imprisoned under said sentence.

On appeal to the United States Circuit Court for the Second Circuit, the judgment of conviction was affirmed by a divided court (136 F. (2d) 394). The appeal was argued on February 9, 1943 and was decided eighteen weeks later on June 8, 1943, by a divided court. The order of affirmance was entered June 24, 1943 (R. 60). The majority opinion in the Circuit Court of Appeals was written by Circuit Judge Thomas W. Swan (R. 47-56) and the dissenting opinion by Circuit Judge Charles E. Clark (R. 56-58).

Summary Statement of the Matter Involved

The indictment charged the defendant with a scheme to defraud by means of "kiting" checks (R. 1-7). In

* "R" refers to Transcript of Record printed in this Court subsequent to the granting of the Writ. Compare "CR" references; see footnote at p. 4, *infra*.

essence, it was alleged that the petitioner in New York City and elsewhere cashed checks drawn on an account in Michigan in which there were insufficient funds and that he thereafter cashed additional checks and wired to the Bank the cash proceeds of the later items in order to cover the earlier checks, petitioner relying on the usual passage of four days from the day of cashing to the date of clearance of each check. It was alleged that the petitioner continued this practice from August, 1936 to the date of the filing of the indictment in August, 1940 (R. 1-7).

At the trial the Government offered proof as to alleged defrauding in transactions with Essex House, Edward S. Reynolds and Stout & Co. (CR 1150-1).*

The indictment itself named only Essex House and Reynolds, but, by a bill of particulars served prior to trial, Stout & Co. was named as a victim (CR 14z). At the trial a substantial portion of the evidence consisted of facts relating to the defendant's transactions with Stout & Co. (CR 712-985, 1030-3, 1306-89, 1429-57).

At the trial and through the mouths of the Government's own witnesses it was shown that the alleged "kiting" and consequent alleged defrauding of the victims occurred with their affirmative knowledge and with their own active participation. The knowledge of the victims referred to was the awareness that the very checks that they were cashing for the defendant were at that time without funds behind them; that previously issued checks were being paid through the cashing of subsequent ones and that unless the victims would cash additional checks

* "CR" refers to Record filed on behalf of petitioner's application for the Writ. Pursuant to order allowing Writ, it is to be treated as though filed in response to Writ. By virtue of stipulation between Petitioner and Solicitor General, filed in this court, reference to this Record is permitted.

the earlier ones could not be paid. In short, such knowledge has made each of the alleged victims a willing participant with the defendant in the transactions. The alleged victims were either knowingly accommodating the petitioner (as in Essex House and Reynolds) or there was a financial business arrangement involving the planned cashing of these checks as compensation to the petitioner for services being rendered (as in Stout & Co.). The nature of the evidence developed at the trial was so unconvincing of any fraud that it led Judge Clark in the Circuit Court below to state:

> "The present is one of those disturbing cases where the conduct of the defendant is most unattractive, to put it mildly; and yet there was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished." (R. 56).

With respect to the Reynolds transaction, Judge Clark declared that the evidence pointed

> "more in the direction of a violation of agency instructions than an intent to defraud by mail" (R. 57)

and he concluded his opinion by stating

> "I must express my fear that defendant was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail." (R. 58).

The Objectionable Testimony.

In an effort to prove out of the petitioner's own mouth* that he had evolved a scheme to defraud, the Government offered and the Trial Court admitted into evi-

*Petitioner chose to remain mute at the trial in accordance with his basic rights and did not take the stand as a witness on his own behalf.

dence, over objection and exception and claim of violation of petitioner's constitutional rights, testimony compulsorily taken under oath in the Courts of the State of New York at various times by virtue of the statutes and laws of the State of New York. The introduction of this testimony into evidence occurred towards the end of the prosecution's case. It took up approximately one and one-half days of court time and the matters contained therein were strongly commented upon by the prosecutor in summation notwithstanding continued objection by petitioner (R. 10-12). These supplementary proceedings were offered to prove the alleged "kiting" of checks with Essex House and Stout & Co. by the method as set out in the indictment, that is, the cashing of checks at regular periods, the wiring forward of sums received from the later checks to meet the earlier cashings, and the inability of the defendant to meet the checks issued by any other method than the "kiting". In addition, the supplementary proceedings were used to prove the relationship of the defendant with the alleged victims, the general financial condition of the petitioner and other matters of a generally prejudicial nature to him. In fact, the prosecution used the supplementary proceedings examinations to establish each and every fact which it was required to prove in order to maintain a case under the statute upon which the indictment was based.

The nature of the supplementary proceedings examinations admitted into evidence was such that even the majority below admitted that

> "if the objection was well taken the judgment must be reversed." (R. 50).

ARGUMENT

Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation.

The Government introduced at the trial testimony compulsorily given by the petitioner, Samuel H. Feldman, on ten occasions in the courts of the State of New York in supplementary proceedings under an Immunity Statute (R. 12-43). This testimony was offered and admitted near the end of the Government's direct case. The judgment creditors' attorneys who had conducted these examinations of the petitioner in the State Court appeared as witnesses for the Government; certain portions of the examinations were offered in evidence (R. 12-43), read to the jury and stressed by the prosecutor on summation (R. 10-12).

The Government used the supplementary proceedings examinations of the petitioner in an effort to prove out of the defendant's own mouth each and every fact required to establish a case under the statute upon which the indictment was based.

The testimony given by the petitioner on various occasions from 1936 through 1939 was given pursuant to the laws of the State of New York and particularly the Supplementary Proceedings Statutes (Article 45, Sections 773-792, *New York Civil Practice Act*). The attendance and testimony of the petitioner at those examinations was

compulsory and the petitioner was protected in the State of New York upon the giving of such testimony under Section 789 of that Act.

The Fifth Amendment of the United States Constitution provides that no "person shall be compelled in any criminal case to be a witness against himself". In accordance with that constitutional right, the defendant, in the case at bar, chose to remain mute and elected not to testify at his trial. Nevertheless, through the admission of the supplementary proceedings examinations, he was, in effect, compelled to be a witness against himself in violation of the Fifth Amendment.

The constitutional protection against self-incrimination is a sacred right guaranteed by the Bill of Rights. It has been held that it should be "liberally construed" in favor of defendant.

> *Boyd* v. *U. S.*, 116 U. S. 616, 635 (1885);
> *Safarik* v. *U. S.*, 52 F. (2d) 892, 897 (C.C.A. 8th, 1933).

That the said constitutional protection against self-incrimination, guaranteed by the Fifth Amendment, was deeply rooted in the laws of the colonies even prior to the adoption of the Constitution of the United States and was well recognized as one of the fundamental rights, endeared to the founders of this country through historical background and suffering, has been amply demonstrated.

> (See Discussion in Pittman: "*The Colonial and Constitutional History of the Privilege against Self-Incrimination in America*", 21 Va. Law Review 763-789.)

It is also clear that the intention was to incorporate the entire common law privilege into the Constitution,

and that this Court has given it a historical interpretation.

> (See Dissent of Frank, J., at page 848, in *U. S.* v. *St. Pierre*, 132 F. (2d) 837 (C.C.A. 2d, 1942); certiorari granted 318 U. S. 769, 63 Sup. Ct. 769; appeal dismissed 63 Sup. Ct. 910.)

It has been appropriately said that historical liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

> (Holmes, J., in *Northern Securities Co.* v. *U. S.*, 193 U. S. 397, 400.)

In the State of New York, a judgment debtor can be compelled to appear in court and give testimony concerning his affairs under oath. He may not refuse to testify under penalty of a contempt order resulting in fine or imprisonment (*New York Civil Practice Act*, Sec. 789).

However, such testimony cannot be used against him in any criminal proceeding in the State (*People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927)). The prohibition against this use in any way is so strong that its admission is reversible error even though no exception was taken (*People* v. *Doyle*, 58 Hun 535 (N. Y., 1890)).

It is not claimed here, nor was it claimed in the Circuit Court below, that the New York State Statute immunized the petitioner against prosecution in the Federal Court.* However, by reason of that State's Statute, the

* It can well be argued, and there is some authority to the effect, that, by reasons of comity, where a person is compelled to answer questions under the immunity Statute of one jurisdiction, another jurisdiction should not allow that testimony to be used there against him. See *State* v. *Verecker*, 124 Me. 178, 180 (1924).

petitioner was compelled to testify in the New York Court no matter how incriminating such testimony might be. He had no right in the New York Court to refuse to answer in that proceeding on the ground of self-incrimination under the Fifth Amendment.

Jack v. *Kansas,* 199 U. S. 372;
cf. *Brown* v. *Walker,* 161 U. S. 591 (1895).

In *Jack* v. *Kansas, supra,* a State Anti-Trust Statute compelled testimony to be given in the State Court and provided an immunity similar to that contained in Section 789 of the New York Civil Practice Act referred to above. The petitioner had refused to testify, nevertheless, and raised his constitutional privilege, claiming that the State Immunity Statute did not protect him against prosecution under the Federal Anti-Trust Act. The Kansas Court held him in contempt and sentenced him to be imprisoned. This Court affirmed the judgment of the State Court on the ground that the danger of a Federal prosecution was remote and that it did not believe that the evidence would be availed of by the government for the purpose of prosecution.

Similarly, in *Brown* v. *Walker, supra,* a like rule was laid down where there was a Federal Immunity Statute, and the petitioner attempted to refuse to answer under a claim of privilege against self-incrimination under the State law.

A very late pronouncement of the lack of privilege in one jurisdiction against possible incrimination in another jurisdiction is contained in *U. S.* v. *St. Pierre,* 128 F. (2d) 979 (C.C.A. 2d, 1942).

"But the asserted privilege is non-existent when the answer sought would not tend to show commis-

sion of a federal crime by a witness. That it would tend to show commission of a crime under such law is irrelevant. *U. S.* v. *Murdock,* 284 U. S. 141." (p. 980)*

If is the use in the Federal Court below upon the trial of petitioner, over his objection, exception and claim of violation of his constitutional rights, of his testimony in the supplementary proceedings in the courts of the State of New York, under penalty of fine and/or imprisonment, given at a time when under prevailing decisions of this Court and the New York Courts, he had no choice, that is assigned here as error.

That danger which this Court in *Jack* v. *Kansas, supra,* believed was "too remote" and which this Court, in *Brown* v. *Walker, supra,* regarded as a "remote and naked possibility of imaginary and unsubstantial character" (pp. 599-600) has come to pass. That type of evidence which this Court could not believe would ever be availed of by the government was used by the prosecution in the case at bar to effect the conviction of this petitioner.

There is only one case in the entire country, a decision of the highest court of the State of Florida, *Clark* v. *State,* 68 Fla. 433, 67 So. 135 (1914), which has passed upon this important constitutional question, and that decision supports the petitioner's contention herein. The majority of the court below argued that the *Clark* case was not controlling because it presented the converse of the situation at bar. It might just as well be argued that the decision in *Brown* v. *Walker, supra,* did not irresistibly lead to the decision in *Jack* v. *Kansas, supra.*

* The courts of the State of New York follow this rule as to the non-privilege of a person in one jurisdiction against incrimination in another jurisdiction. See *Dunham* v. *Ottinger,* 243 N. Y. 423 (1926).

Judge Clark, however, in his dissent below, stated that while the law was not settled, he believed that the *Clark* case stated the better rule unless "we definitely wish to trap persons between the interstices of the overlapping State and Federal sovereignties" (R. 57).

In the *Clark* case, *supra*, the defendant was indicted in the State Court for the crime of embezzlement. Section 12 of the Constitution of the State of Florida is the counterpart of the Fifth Amendment of the Constituiton of the United States relating to self-incrimination. Clark, a bankrupt, had testified at the first meeting of creditors in the Federal Court, pursuant to the Bankruptcy Act. Under another section of that Act, he was given protection in the Federal Court by virtue of such testimony. The State Prosecutor in the subsequent embezzlement trial introduced into evidence notes taken by a court reporter at the bankruptcy hearing setting forth the testimony of Clark. On appeal, this was assigned as error. The Supreme Court of Florida held that the admission of that testimony, standing alone, was reversible error. It stated at page 436:

> "To permit the introduction of such proffered testimony would be violative of the provisions of Section 12 of the Declaration of Rights in our State Constitution in compelling indirectly at least, the defendant in a criminal case to be a witness against himself."

In connection with the *Clark* case, it is to be noted that the Court there, just as the petitioner does here, specifically disclaimed any reliance upon a possible doctrine that the immunity statute of one forum can give immunity from prosecution in another forum. The decision was based wholly upon the constitutional protection

of the Florida State Bill of Rights, which is the exact equivalent of the Fifth Amendment to the Federal Constitution.* The government below, the Circuit Court below, as well as the Solicitor General in this Court in opposing the application for the writ, have been unable to cite a single case holding directly to the contrary.

Shifting Theories in Support of Admissibility

An analysis of the arguments by the proponents of admissibility of the supplementary proceedings examinations shows that they have been unable to agree on any one legal theory. For example, the theory of attempted justification by the United States Attorney in the court below, who relied on *Vause* v. *United States*, 53 Fed. (2d) 346 (C.C.A. 2d, 1931), cert. den. 284 U. S. 661, was promptly discarded by the majority below (R. 52) which then proceeded to advance a theory of its own.

The majority admitted, however, that it was unable to find any decision directly supporting the view that the testimony was admissible (R. 52). It apparently relied on a series of cases in this Court wherein it was held that a person may not raise a privilege against self-incrimination in one jurisdiction upon the ground that his answers may tend to incriminate him under the laws of another and different jurisdiction.** Obviously this is not determinative of the case at bar. In the present case, the problem is the validity of the use in another jurisdiction of the testimony which defendant had theretofore been compelled to give in the first jurisdiction. That problem has been raised only by *Clark* v. *State*,

* It would appear that the State of Maine would reach a like result under similar circumstances but upon a doctrine of comity. See *State* v. *Verecker*, 124 Me. 178, 180 (1924).

** *U. S.* v. *Murdock*, 284 U. S. 141; *Hale* v. *Henkel*, 201 U. S. 43, at page 69.

supra, and was there decided in a manner favorable to petitioner.

The majority of the Circuit Court below argued further that even if there were a violation of the Fifth Amendment "the record here fails to show wherein the appellant suffered prejudice" (R. 53). It is impossible to reconcile such attempted justification by the majority at that point with that portion of their opinion wherein they state (with respect to the objectionable testimony) that "if the objection was well taken, the judgment must be reversed" (R. 50).

A mere cursory reading of the damaging and highly inflammatory testimony given by the petitioner under compulsion in the State Courts will clearly spot-light the prejudice that the majority below presumably was unable to find.

Apparently, unconvinced of the soundness of their general ruling at this point, the majority below isolated one out of the ten examinations in supplementary proceedings, that taken in July, 1937 (R. 53), attempted to justify its particular admission into evidence and then brushed aside the remaining and additional supplementary proceedings at later dates (Government Exhibits 95, 95A, 95B, 100, 101, R. 13-35) upon the ground that they could have had no substantial effect upon the jury's verdict. A reading of these other supplementary proceedings will clearly establish that any one of them, and certainly all of them together, must have had a tremendous effect upon the jury.

However, the argument for the admissibility of the testimony in the July, 1937 supplementary proceedings falls of its own weight upon even the slightest analysis. The majority states that petitioner could not have had a

privilege in July, 1937 against testifying as to a crime he did not commit until August (R. 39). A reading of the indictment (R. 1-7) shows that the scheme to defraud in question was alleged to have commenced on July 1, 1936 and to have continued up to and including the date of the filing of the indictment, to wit, August, 1940. At the time petitioner testified in supplementary proceedings in the State Courts in July, 1937, he was, according to the indictment and the proof elicited at the trial below, right in the midst of the crime in question. In fact, the supplementary proceedings testimony of July, 1937 was admitted for the very purpose of proving an essential element of the crime charged, to wit, "kiting" in 1937 (R. 10).

Again, reliance was placed by the Circuit Court majority on the fact that the Government had delayed the indictment until August, 1940 and had thereby allegedly given petitioner immunity against prosecution for offenses committed prior to August, 1937, and, therefore, had rendered admissible the testimony in question. The fact is that the indictment charged (R. 1-7) and the jury found (R. 8) that petitioner, from January 1, 1936, up and through August, 1940, devised a scheme to defraud and mailed certain letters in furtherance thereof. It is difficult to understand what sort of immunity was given by the Government's failure to indict sooner. This argument of the Circuit Court evades the issue entirely. The test is *not* whether the delay in indicting gave petitioner a form of immunity from punishment. The test *is* whether the state testimony, when elicited, was compulsory and self-incriminating. If it was, it was tainted—so far as its subsequent use against the defendant was concerned. In any event, there can be no gainsaying that essential, vital and highly prejudicial evidence proving a

basic and necessary element of the Government's case was established by means of that compulsory testimony theretofore given in the State Courts. Consequently, there was a clear deprivation of petitioner's constitutional right against self-incrimination. Judge Clark, in the dissenting opinion below, states unequivocally:

> "In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the Statute of Limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by McNabb *v.* United States, 63 S. Ct. 608, 613." (R. 58)

The majority of the Circuit Court below took some eighteen weeks to render its opinion affirming the judgment of the District Court. The Solicitor General, however, in this court, in opposing the application for the writ, completely jettisoned the reasoning of both the Circuit Court majority and of the United States Attorney. The respondent insists that the right result was reached and offers a new and different theory in its support.

The Solicitor General's Theory

The Government in this Court has for the first time (in opposing the application for a writ of certiorari) divided the supplementary proceedings testimony taken on some ten occasions over a period of four years in four independent actions into those taken prior to March, 1938, and those taken subsequent thereto.*

* This was done apparently in an effort to persuade this Court that the constitutional problem was not raised in this case and that the judgment below could be affirmed on some basis of non-prejudice. An amendment to the Immunity portion of the New York State supplementary proceedings statute (Civil Practice Act, Sec. 789) became effective on March 14, 1938.

Supplementary Proceedings Testimony Subsequent to March, 1938

The Solicitor General argued that the testimony in the five supplementary proceedings examinations taken subsequent to March, 1938 (R. 13-32, 33-36) were properly admitted at the trial (over objection and exception) because (a) that testimony was merely cumulative of testimony taken in the earlier supplementary proceedings and therefore was not prejudicial; (b) the petitioner must be charged with having waived his privilege against self-incrimination under the Fifth Amendment by reason of his testimony in the other and earlier supplementary proceedings examinations; and (c) such testimony was in any event admissible because, on its face, it was not *per se* incriminating. The record alone disproves the first contention; the law invalidates the second; both the record and the law defeat the third.

The record shows that a vital part of the prosecutor's case at the trial consisted of proof that during 1938-1939 the petitioner allegedly "kited" many hundreds of thousands of dollars in checks by cashing them with Stout & Co., as a result of which it was claimed this company was defrauded of $81,000.*

The transactions with Stout & Co. did not commence until the fall of 1938 and the proof covered a period time beginning in the fall of 1938 and ending in the spring of 1939 (CR 714-715, 852-855). The supplementary proceed-

* Whether Stout & Co. (a partnership) was a part of the scheme to defraud, as indicated by the indictment as amplified by the bill of particulars, wherein it was named as a victim, (p. 14z) or whether the transactions with Stout & Co. were in the nature of similar acts, as the Government now contends, is unimportant at this point because, in any event, no one reading the record can gainsay that the evidence presented as to Stout & Co., and the Judge's charge in connection therewith, made it a vital part of the proof presented to the jury for the purpose of convincing it that the defendant should be convicted of the crime charged in the indictment.

ings testimony taken prior to March, 1938, concerned the defendant's situation and conduct during and prior to 1936-1937* and obviously could not concern or relate to his situation or conduct with respect to 1938-1939, at which time he was involved with Stout & Co.

To establish the crime charged against the defendant as to Stout & Co., the government attempted to—indeed had to—prove a fraudulent scheme on the petitioner's part to issue, and then have Stout & Co. cash, a large number of checks, as well as prove the petitioner's inability and lack of power *at that time* to have such checks paid upon their arrival at the bank on which they were drawn. Proof of all of these elements was necessary in order to sustain this phase of the government's case and a failure of proof as to any one of them would be fatal to the prosecution's position. The record discloses that essential evidence as to the petitioner's relations with Stout & Co., of his check "kiting" activities with them and of his inability and lack of power to pay the checks theretofore cashed with Stout & Co., was supplied by the defendant's compulsory testimony in supplementary proceedings taken subsequent to March, 1938.** It is patent on the face of this record that the 1938-1939 supplementary proceedings testimony concerning and relating to Stout & Co. could not be and were not cumulative of the supplementary proceedings testimony taken in 1936-1937, during which period the petitioner was active in connection with the Essex House and Reynolds House transactions, and which latter period was well over a year prior to the inception of the Stout & Co. transactions and had

* This was the period of time during which the defendant had transactions with Essex House and Reynolds.

** See Appendix I hereto, pp. 39-44; to facilitate analysis we have appended therein illustrative portions of the supplementary proceedings testimony subsequent to March, 1938.

no relation to them. Therefore the government's contention that the violation of petitioner's rights under the Fifth Amendment should be overlooked by reason of the cumulative quality of the evidence admitted, must fail.

This Court has indicated on prior occasions its attitude toward such a claim. In *Bram* v. *U. S.*, 168 U. S. 532 (1897), Mr. Justice White at page 541 stated as follows:

> "It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt."

The government also attempted to make use of the alleged cumulative quality of the supplementary proceedings examinations subsequent to March, 1938* by arguing that the petitioner waived his constitutional privilege under the Fifth Amendment with respect to that admittedly compulsory testimony by reason of his having

* As to this testimony, the government concedes that the Immunity Statute of the State of New York was valid and complete after March, 1938, and that thereafter the defendant, as a subpoenaed party, had no choice but to comply with the subpoena and to answer the questions propounded. (See Appendix II of this brief embodying original and amended Section 789, New York Civil Practice Act, page 46.)

testified in certain supplementary proceedings in 1936-1937.

With respect to the 1938-1939 testimony, not only did it concern, as above indicated, transactions and conduct covering a different period of time from that treated in 1936-1937 examinations, but four out of the five examinations in 1938-1939 had been conducted pursuant to a civil judgment against the defendant in a case (*Moyer* v. *Feldman*)* entirely separate from and unconnected with the civil cases, *Hearst Hotels Corp.* v. *Feldman, Corwend Corp.* v. *Feldman, 58-59 Realty Corp.* v. *Feldman,*** pursuant to which the defendant had been examined in 1936 and 1937.

The Solicitor General relied on Sec. 2276 of Vol. 8 of *Wigmore's Treatise on Evidence* (3rd Ed., 1940), for authority to the effect that there was a waiver of the constitutional privilege against self-incrimination as to the 1938-1939 testimony by reason of the 1936-1937 testimony. That section can give little comfort to the Government's position in view of the fact that, as shown above, the testimony was taken in different proceedings, related to transactions at other and different times, and was admitted in the trial court as evidence of fraud in the Stout & Co. transactions, whereas the 1936 and 1937 testimony referred to the defendant's transactions and conduct as bearing upon Essex House and Reynolds as alleged victims. Applying the test set forth in Wigmore's Treatise,*** it is apparent that there was no waiver in

* R. 13-31 incl.
** R. 31-42 incl.
*** In order to have a waiver operate, not only must the later and other examinations refer and relate to the same transactions and alleged illegal acts but the waiver "is limited to the *particular proceeding* (italics ours) in which he thus volunteers testimony." *8 Wigmore on Evidence* (3rd Ed. 1940), Section 2276, pages 450-451. In the case at bar there were, as seen above, four different particular proceedings.

the case at bar. If the Solocitor General's theory be correct, then once a debtor has testified in supplementary proceedings without raising his privilege against self-incrimination (assuming that such privilege existed at the time), he has forever debarred himself from raising that constitutional privilege in subsequent examinations in different proceedings, even though the subsequent and different examinations relate to other facts, situations and crimes. The fallacy of this theory is apparent on its face. If there had been a waiver it could operate only as to the transactions which the earlier testimony directly concerned and it could not operate *in futuro* as to different facts, different situations and different alleged illegal acts.

The final argument of the Solicitor General as to the compulsory supplementary proceedings testimony taken subsequent to March, 1938, was that these examinations were not clearly on their face *per se* wholly incriminating, and therefore the petitioner could not receive the protection of the immunity statute of the State of New York.*

The elements of the mail fraud scheme charged in the case at bar consisted of proof that the defendant had cashed checks with the alleged victims, 1) at a time when he had insufficient funds in the bank to clear those checks, 2) when he was without the means or resources to meet them, and 3) that he cashed additional lafer checks to provide the funds to meet the earlier ones. It is obvious from the excerpts of the 1938-1939 supplementary proceedings set forth in Appendix I hereto that those supplementary proceedings examinations were greatly preju-

* A person receives the protection of the New York State immunity statute by testifying in conformity with it and does not have to refuse to answer first to secure its protection. Section 789 C. P. A.; cf. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926) and *United States* v. *Monia*, 317 U. S. 424 (1943). Of course, it is clear that in any event a person testifying in the courts of the State of New York, is unable to claim a privilege as to incrimination under the federal law. *Jack* v. *Kansas*, 199 U. S. 372 (1905).

dicial to the petitioner, highly relevant and most important to the prosecution's charge of a federal crime and, needless to say, were most incriminating. That same testimony was also most incriminating under various criminal statutes of the State of New York.*

That this type of testimony receives the protection of the constitutional privilege and accordingly, of the immunity statute, admits of no doubt. It is not necessary that each piece of testimony prove the entire crime.** Moreover, the privilege against self-incrimination is not confined only to those instances where at least one of the definite elements of a crime is the subject of the testimony. As was said by Learned Hand, J., in *United States* v. *Weisman*, 111 Fed. 2nd 260 (C.C.A. 2nd, 1940) at page 262:

> "All crimes are composed of definite elements and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached . . ."

A fortiori, in the case at bar, where the supplementary proceedings testimony of 1938 and 1939 supplied *several* of the vital elements of the crime in the Stout & Company matter under federal law, as well as under state law, there can be no doubt as to the incriminatory nature of the testimony. Accordingly, this portion of the Government's claimed justification falls of its own weight.

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* See *New York Consolidated Laws* (*Cahill*), c. 41, Sections 921, 925, 932, 938, and *New York Penal Law*, Sec. 1292a.

** "Most criminal acts are made up of two or more subordinate facts each essential to the completed crime * * *. In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole." *8 Wigmore, Evidence* (3rd Ed. 1940), Section 2260.

The prosecution has therefore signally failed to prove that no violation of the Fifth Amendment occurred by reason of the admission of the supplementary proceedings subsequent to March, 1938. The admission into evidence of those five prejudicial supplementary proceedings examinations must, standing alone, result in a reversal of this conviction.

Supplementary Proceedings Testimony Prior to March, 1938

Even as to the supplementary proceedings testimony taken prior to March, 1938 and admitted into evidence in the District Court below over petitioner's objections, it is well settled law that, at the time he gave that testimony pursuant to subpoena in the state court, the petitioner could not raise a privilege against self-incrimination under the Fifth Amendment in that his testimony might incriminate him under the federal law. *Dunham* v. *Ottinger, supra.* It can hardly be argued that there was a waiver of that privilege by the petitioner at the time he testified in the state court in view of the fact that he had no federal privilege at that time, and the mere raising of it would have been a futile gesture. Equally invalid is any contention that if the petitioner might have raised a state privilege (under the then form of state immunity statute) as to the 1936-1937 testimony and failed to do so, he thereby waived a federal privilege which he did not at that time have.

The 1936-1937 supplementary proceedings examinations were taken pursuant to the laws of the State of New York and particularly the supplementary proceedings statutes (Article 45, Section 773-792, *New York Civil Practice Act*). The attendance of petitioner at those examinations was compulsory. He was required to an-

swer the questions put to him and he was forced to give answers even though those answers might incriminate him under a federal statute. *Jack* v. *Kansas, supra.*

The Solicitor General has interjected the question of the validity of that portion of the supplementary proceedings statute which refers specifically to the immunity given in the State of New York. That immunity statute, valid or invalid, could, of course, give no immunity for prosecution in the federal court. Any protection that the defendant might have against incrimination under the federal law would arise out of his rights under the Fifth Amendment; and under *Jack* v. *Kansas, supra,* that right did not exist and could not be raised in the state court. Accordingly, the first time that the petitioner could avail himself of the protection of the Fifth Amendment was when the testimony was offered against him in the trial court below, and at that time he did seek that protection in no uncertain terms.

Whatever the effect of the validity or the partial validity of the New York State immunity statute (or for that matter the entire absence of any immunity statute) might have on the privilege of the defendant to refuse to answer questions in supplementary proceedings, the answers to which might incriminate him under a New York State law, that question is entirely irrelevant here. The sole issue in the case at bar, even as to the 1936-1937 testimony, is: Whether petitioner, who had theretofore been subpoenaed under the laws of New York and had pursuant thereto given testimony under oath which incriminated him under the federal law (and, at the time of testifying, he had no privilege to refuse to answer on the ground of incrimination under the federal law) is entitled to assert his right to the protection of the Fifth Amendment when that testimony is subsequently offered

against him in the federal court? The problem is simply one of whether, as the minority analyzed it in the Circuit Court below, a person is to be trapped between the "interstices" of overlapping state and federal sovereignties.*

The Solicitor General, in opposing the application for the writ herein, attempted to bring the situation here within the doctrine of *Wilson* v. *United States,* 162 U. S. 613 (1896).

The *Wilson* case was one where the defendant had given a voluntary statement, not under oath, to the United States Commissioner, and that statement was subsequently used in his trial in the United States court. At the time that the statement was given, the petitioner there could have raised his constitutional privilege under the Fifth Amendment, but failed to do so. The statement itself was finally admitted in the federal court. There was no question of overlapping and different jurisdictions nor of the absence of an exercisable federal privilege at the time the statement was originally made. *Wilson* v. *United States* is merely declaratory of the well established law that a person who *has* a privilege that *can* be exercised but nevertheless *fails* to exercise it, waives it. Indeed, on the precise facts of the *Wilson* case, it is one dealing with the voluntary nature of a confession rather than with a waiver under the Fifth Amendment.

The *Wilson* decision is therefore in no way determinative of the case at bar which involves the problem of overlapping jurisdictions. This Court, in *Jack* v. *Kansas, supra;* at page 382, said that it did not believe that the evidence obtained compulsorily in the state court would be

* It must be noted that this testimony could never have been used against the petitioner in any New York State criminal proceeding (*People* v. *Carlson,* 222 App. Div. 54 (4th Dept., 1927).

used in the federal court, and the defendant was, therefore, directed to answer the questions in the state court. The case at bar presents the situation where that which this Court believed would never happen has, in fact, happened. Any contention that *Wilson* v. *United States, supra,* or cases of its type are determinative of the question in the case at bar, is patently unsound.

The Supplementary Proceedings Examination Were "Testimonial"

The Solicitor General further claimed that the case at bar does not involve self-incrimination under the Fifth Amendment because the supplementary proceedings testimony is not "testimonial" in nature. It is true that the protection of the Fifth Amendment extends to "testimonial" matters only, but, by no stretch of the imagination, can the sworn testimony of the petitioner, pursuant to subpoena of a court of record of the State of New York, be considered anything other than "testimony".

The Solicitor General relied upon the authority of a group of cases dealing with books, records and reports. Such cases are clearly inapplicable. *Wigmore's Treatise on Evidence,* in analyzing the "testimonial" protection given by the Fifth Amendment, says:

> "The privilege protects a person from any disclosure sought *by legal process against him as a witness.*" *

Such cases are readily distinguishable from the instant case, in that they fall within the rule that:

> "* * * documents * * * obtained from the person's control *without the use of process*

* *8 Wigmore* (3rd Ed.), Section 2264, page 363.

> *against him as a witness* are not in the scope of the privilege. . . ."*

In *Ensign* v. *Pennsylvania*, 227 U. S. 592 (1913), this Court, in defining "testimony", stated quite clearly that examinations under the Bankruptcy Act (similar in nature to supplementary proceedings in a state court), were "testimony" (see p. 599). There this Court drew a sharp distinction between the examination of a debtor and his sworn bankruptcy schedules filed in court.

Can the Government seriously contend that, had the testimony of the petitioner in the supplementary proceedings been proven in the trial court below by the oral testimony of the attorney who had conducted the examinations or by the reading of the stenographic minutes thereof, the petitioner's rights would have been different? Does testimony become any less testimony because it has been transcribed on paper?

In *Regina* v. *Garbett*, 2 Car. and K 474 (England 1847), the prosecutor in a criminal case offered in evidence, through the shorthand notes of a court reporter, the testimony of the defendant which had been given as a witness in a civil case and in which he had been directed to answer after having raised his privilege against incrimination. The majority of the court held the conviction was wrong and reversed the judgment.

From the holding in this case, it is clear that evidence given compulsorily under oath in a prior proceeding and admitted at the subsequent trial of the witness as a defendant in a criminal case is testimonial in nature whether

*8 *Wigmore, Evidence* (3rd Ed.), Section 2264, page 364. While it is not essential to petitioner's case, it is interesting to note that even as to books, records or chattels, there would be a violation of the Fifth Amendment if they were obtained from a defendant in response to a subpoena or other process treating him as a witness. *Wigmore*, same section.

the transcribed minutes be offered or the shorthand notes be read, and its admission is a violation of the privilege against self-incrimination.

The Solicitor General also was forced to seek the assistance of precedents in cases involving statutory requirements that a person file reports with a public agency. The best refutation of the applicability of that line of cases to the instant case is found in Section 2259c of *Wigmore's Treatise on Evidence* (3rd Ed.) entitled "Crime disclosed in (1) Public Books or (2) Books Required by Law to be Kept", which reads as follows:

> "The same reasoning applies to records required by law to be kept by a citizen not being a public official, e.g., a druggist's report of liquor sales or a pawn broker's record of pledges. The only difference here is that the duty arises not from the person's general official status but from the *specific* statute limited to a particular class of acts." (Italics ours.)

In that connection, in *United States* v. *Mulligan*, 268 Fed. 893 (1920), the court, distinguishing between records or reports required as an incident to the privilege of engaging in enterprises regulated by statute and testimony and private records, at page 897 said:

> "The privilege and immunity of a citizen in his private affairs is carefully safeguarded and distinguished. . . . Without such distinction of the rights of the individual in his private unregulated business from his status when engaged in business only by permission of the government and under government regulations, the safety of the nation might be in danger."

As a matter of fact, even as to reports required by governmental authority or agencies, such as income tax reports, it is doubtful whether a person could be required to set forth facts in such reports which would incriminate him (see *United States* v. *Sullivan*, 274 U. S. 257 (1927)).

In the case at bar, we are not dealing with books, records, chattels, reports or even documents. On the precise facts of the case at bar this Court's support of the Government's theory would establish the doctrine that a person's examination under oath, pursuant to subpoena of a court of record, is not "testimony". As well might it be said that the testimony of a defendant before a Grand Jury in violation of his constitutional rights against self-incrimination is, nevertheless, admissible against him at his trial, provided the minutes are transcribed and the typed document, rather than oral testimony concerning the same, is offered in evidence.

Basic and Fundamental Rationale

It has been claimed throughout this case by those who have defended the admission of the supplementary proceedings testimony that there are no cases squarely in point, but that there are available precedents, which, by analogy, are determinative of the problem. The petitioner, on the other hand, has constantly disputed the allegation that there is no authority precisely in point, and has heretofore cited *Clark* v. *State*, *supra*.*

The Government as well as the majority below relied on what they regarded as precedents by analogy. Perhaps as a result of the spectre of *stare decisis* hovering

* In addition, there is the indicated holding of the Maine court in *State* v. *Verecker*, *supra*.

over the Government, the Court below and the petitioner, the basic problem involved and the most direct approach to its solution may have been generally slighted. The most logical approach to its solution seemingly requires an analysis of the Fifth Amendment, and, more particularly, its historical background and basic purpose. It would be well, therefore, to inquire what, if anything, is inherent in the Fifth Amendment which would prevent this Court from giving its protection to the situation of the petitioner in the case at bar.

That portion of the Fifth Amendment that provides a privilege against self-incrimination had its roots in the early English Common Law, as well as in the early American Colonial Law.* The settlement of the English colonials in the new world took place at a time in English history when opposition to the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. This agitation against self-incrimination extended to both physical torture and compulsory oath and testimony thereunder.**

The trial of John Lilburn*** focused the attention of the whole of England upon proceedings in the Star Chamber, High Commission and other courts using *ex-officio* proceedings, wherein persons accused were forced to confess their crimes either by compulsion of oath or by physical compulsion. Lilburn had refused to take oath or answer against himself, and his attitude was representative of a like attitude of a multitude of others who refused

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* *Brown* v. *Walker*, 161 U. S. 591, 596 (1895); *Bram* v. *United States*, 168 U. S. 632 (1897).

** Pittman: *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. Law Rev. 763.

*** *3 Howard St. Trials*, 1315.

to be sworn, or, having been sworn, refused to answer. This privilege became so well established in the general law of England as far back as the early 1650's that it was never thought necessary by any English Parliament to pass any law touching on that matter.

The agitation for the privilege against self-incrimination was not confined to England; it was carried over to America by the Puritans in our early Colonial history. The development of the privilege in the colonies combined, as in England, the agitation against both compulsory oath and the use of torture or physical compulsion.

We find that, in the early history of Massachusetts in 1642, it was well agreed that compulsory oath and testimony thereunder were banned, but there was some opinion disputing the proposition that confessions by torture should receive like protection.* To the Puritan's mind, then, to force testimony from an accused by means of an oath was worse than physical torture or "the third degree".**

Furthermore, clearly inherent and basic throughout the historical evolution of the privilege is the fact that the real evil which was to be guarded against was the use of the extracted testimony for the purpose of punishment

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* Three ministers of Governor Bradford of Plymouth in 1642 to whom had been turned over the question of compulsory self-incrimination, agreed unanimously that compulsory oath was against both the laws of man and the laws of God whereas, by a majority of two to one, it was stated that physical compulsion could not be used. With respect to a compulsory oath, Mr. Reynor, one of the ministers, stated: "That an oath (*ex officio*) for such a purpose is no due means hath been abundantly proved by ye godly learned and is well known." Even Mr. Chauncy, another minister, who answered that there might be torture, stated with respect to the compulsory oath: "If it be *mente* of extracting by requiring an oath (*ex officio*), as some call it—I fear it is not safe, nor warranted by God's word, to *extracte* a confession from a *delinquente* by an oath." Pittman: *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. Law Rev. 763, at pages 777-779.

** See Frank, J., in *United States* v. *St. Pierre*, 132 Fed. (2d) 837 (C.C.A.) (2d) 1942) at page 842 of his dissent and authorities cited therein; 21 Va. Law Rev. at page 783.

of the guilty ones.* The fact that the testimony was used in a place different from that where taken did not remove or lessen the evil as to which protection was sought.**

Thus we see that the Fifth Amendment, in its protection against compulsory self-incrimination, was derived from both the Common Law of England and that of the Colonies, and historically was clearly intended to cover compulsory disclosure either by torture or by compulsory oath and the use of such compulsory testimony to secure the conviction and punishment of the alleged offender.

Admittedly, the case at bar is one which does not involve compulsory self disclosure by torture or by physical force, but it clearly involves compulsory oath and testimony thereunder, no matter how incriminating, under threat of imprisonment. There was just as much compulsion in the testimony of this petitioner under oath by virtue of the Immunity Statute as there would be if he had been compelled to testify by torture or physical force or threat thereof. As we have seen, historically the compulsion of testimony under oath was just as abhorrent and objectionable, if not more so, than the compulsory self-disclosure by torture or physical force.

Therefore, it is clear that the use of testimony in the Federal Court theretofore obtained by the compulsion

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* It should be noted in England, too, there was great emphasis and agitation against compulsion under oath. Charles I in his letter to the High Commission in 1637 commanded the Commission to compel refractory persons to take an oath and testify against themselves on a penalty of being declared as confessed and convicted legally if they refused. The Trial of Lilburn which commenced in that same year, reflected the objection of the English people to that type of compulsion. In the demands and declarations sent from Cromwell's army in 1647 demand was made for the removal of compulsory oath.

Pittman: on *The Privilege Against Self-Incrimination*, 21 Va. Law Rev., at pages 770-773, inclusive.

** In the colonies, testimonial confessions used in court had frequently been secured in the first instance by the Governor and his Council, constituting the highest court of record. See *Pittman, supra*, at pages 784-5.

of an Immunity Statute is just as much a violation of the Fifth Amendment as would be the use in the Federal Court of testimony obtained in the State Court by means of coercion, torture or physical force or threat thereof. The testimony of the petitioner in the case at bar might, for the purposes of testing its admissibility in the federal court below, have been secured in the State Court in the first instance by the rack, the boot, the thumbscrew or the more modern rubber hose. Can it be seriously argued that the admission of such testimony in the Federal Court would not have been a violation of the Fifth Amendment?*

It would be impossible to distinguish between the case where the conviction of a defendant is secured by means of compulsory self-disclosure brought about by torture or coercion and a conviction secured by compulsory self-disclosure brought about by compelled oath and testimony thereunder. The facts may differ, but the fundamental principle remains the same. Courts must be cognizant of the fine line that can be drawn in the *administration* of law between one kind of compulsory self-incrimination and another. Physical violence to one man may be less terrifying than the threat of imprisonment to another as an inducement to give himself away and present the authorities with the means of convicting him.

Historically, logically and legally, therefore, not only is there nothing in the Fifth Amendment which would prevent this court lending its protection to the petitioner in the case at bar, but there is every reason for it to hold

* This Court has recently, in a series of decisions, reversed convictions obtained in State Courts where they were secured by the use of confessions extracted by force and coercion. *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1935). In the *Brown* case, at page 286, it was said, "it would be difficult to conceive of methods more revolting to the sense of justice." Could any less be said of torture, force or coercion to secure testimonial compulsion?

that the Fifth Amendment compels it to accord that protection in this case.

The Government, as well as the majority in the Circuit Court below, has not been able to cite a single case directly ruling the objectionable testimony to be admissible. As seen above, historically it would appear that the Fifth Amendment would bar the use of such evidence for the purpose of convicting a defendant. Is there any principle or policy set out by this court or by law of the land that would conflict with the decision contended for by this petitioner?

In a recent decision this court said:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."*

This court has indicated its concern

> "not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society."**

It has declared itself as opposed to

> "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection."***

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* *McNabb* v. *United States*, 318 U. S. 332 (1942), at page 340.
** *Id.*, at page 344.
*** *Id.*, at page 344.

It could hardly declare itself any less opposed to easy but self-defeating ways in which testimonial compulsion is substituted for brains as an instrument for conviction of crime.

In the *McNabb* case, *supra*, statements were obtained by the Government without the necessary arraignment of the defendant as required by statute, but Congress had not expressly forbidden the use of the evidence so procured. This court reversed the conviction based on the admission of that evidence. It placed its decision upon the ground that

> "to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."*

Hardly less could be said of allowing a conviction to stand against this petitioner, secured by means of the compulsory self-disclosure made in supplementary proceedings in the courts of the State of New York. That this would be a stultification of the policy enunciated by the Fifth Amendment of the Constitution is clearly seen from the foregoing examination of the historical background of that amendment.

The scope which the courts may permissibly give the privilege against self-incrimination has been debated vigorously. In a recent case a federal court was called upon to rule on the applicability of the privilege to a somewhat new situation. Mr. Justice Rutledge, then sitting as a Circuit Court Judge, discussed the privilege against the background of the world today and said:

> "With world events running as they have been, there is special reason at this time for not relaxing the old personal freedoms won, as this one was,

* *McNabb* v. *United States*, 318 U. S. 332 (1942) at page 345.

through centuries of struggle. Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of decades.

Large in this is a sense of fairness to the person accused, a respect for his individual integrity, in accusation or even in guilt. But larger still is the sense of the court's own part in justice and its administration. By this we mean the sense of the citizen as well as of the court itself."*

An eloquent and moving plea in behalf of the Fifth Amendment is found in a recent case where Circuit Judge Frank stated that he was not moved

> "by any sentimental desire to protect criminals or by a desire to prevent as full judicial scrutiny as is practicable of the facts of cases. I am moved by fear of the consequences to democratic government in general and to the courts in particular, of judicial disregard of specific unrepealed sections of the Constitution. Courts, when they conduct themselves in that manner, invite popular rejection of our established legal institutions by unlawful means."**

An outstanding and eminent authority and text writer on the law of evidence has expressed similar forebodings when he said:

> "any system of administration which permits prosecution to trust habitually to compulsory self-disclosure as a source of proof, must itself suffer morally thereby."***

It must be apparent, therefore, that legal precedent, historical analysis and reasons of policy and principle

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* *Wood* v. *United States*, 128 Fed. (2d) 265, at pages 278-279 (C.C.A., D. C., 1942).

** Frank, J., in *United States* v. *St. Pierre*, 132 Fed. 837 (1942), at page 850.

*** *8 Wigmore on Evidence*, 3rd Ed., Sec. 2251, page 309.

would all dictate a decision that the conviction in this case must be reversed because, in the words of Judge Clark in the court below "in plain fact he (petitioner) was required to incriminate himself." (R. 58) and the use of such testimony was violative of the privilege against self-incrimination under the Fifth Amendment.

Summary

This case is one in which the petitioner was compelled to give testimony in a New York State Court under oath and where the prosecutor in the Federal Court at a subsequent time used that compulsory testimony against him in order to secure his conviction. The admission of this testimony in the court below resulted in the accomplishment of what this Court in *Jack* v. *Kansas, supra,* believed could and would never happen. Allowing such testimony to be admitted against this petitioner did, in fact, trap him between "the interstices" of Federal and State Governments. That was accomplished in the case at bar through supplementary proceedings testimony elicited in a *civil* matter. Tomorrow it may well be a case in which a petitioner, by virtue of an immunity statute, has been compelled to incriminate himself before a State Grand Jury or State Administrative bodies or before State Legislative bodies, and such testimony is used in the Federal Court to secure his conviction of a federal crime. Whatever may be the means of compulsion, be it torture or compulsion under oath by virtue of an immunity statute, whether such testimony occurs in the course of criminal or civil investigation hearing or trial, the principle remains the same. The trapping between the interstices of State and Federal Government and the compulsory self-incrimination of the petitioner violates the spirit of the Fifth Amendment and stultifies its very purpose.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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APPENDIX I*

We here set forth some selected questions and answers appearing in the supplementary proceedings testimony (after March 1938) concerning the period of the Stout & Co. transactions.

Testimony Concerning Relationship With Stout & Co.

(From examination in supplementary proceedings of July 20, 1939, R. 16, *et seq.*, Government's Exhibit 95):

Record Page

17 Q. Where did you stay when you were in Florida? A. At El Mirasol Apartments.

17 Q. Where? A. Miami Beach.

17 Q. Did you keep an apartment there? A. I occupied a room.

* * *

17 Q. Whose office was it? A. Stout & Co.

* * *

17 Q. And who paid the rent for that room? A. it was given to me gratis.

17 Q. By whom? A. By Stout & Co.

* * *

17 Q. Who paid for your meals while you were in Florida? A. The firm paid all my expenses down there.

17 Q. Which firm do you refer to? A. Stout & Co.

17 Q. Were you employed by them? A. I was not.

17 Q. Did you have any arrangement with them under which they paid for your room and board? A. I was there as a friend of Mr. Miller's.

* * *

18 Q. Did you have any business transactions of any kind while you were in Florida from January first until you returned to New York City? A. None whatsoever.

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* Referred to in footnote, page 18 of this brief.

Appendix I

(At the trial, petitioner's position was that he had had business transactions with Stout & Co. in Florida, consisting of cashing of checks in return for services rendered.)

Testimony Concerning Check Transactions With Stout & Co. and Forwarding of Deposits to Meet Checks

(From examination in supplementary proceedings of December 16, 1938, R. 13, *et seq.*, Government's Exhibit 95):

* * *

15 Q. Do you make any deposits in that bank (First National Bank of Petosky, Michigan) in your father's account? A. I do not.

15 Q. Have you ever made any deposits in that account? A. Never.

(From examination in supplementary proceedings of July 20, 1939, R. 18, *et seq.*, Government's Exhibit 95):

19 Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan? A. Not for quite some time.

* * *

19 Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account? A. I think money was sent to Petosky when my father was in the city.

* * *

20 Q. Have you ever within the last two months sent money to the Bank in Petosky for deposit with them in the account of J. Feldman? A. Never.

20 Q. Do you know of any other person who sent money to the Bank at Petosky or to any other person for deposit in the Bank at Petosky? A. No.

(This testimony relates directly to the period of time when petitioner was dealing with Stout & Co. and likewise covers an important element in the crime with which the defendant was charged, to wit, the forwarding of deposits to meet checks.)

* * * *

20 Q. Have you ever asked persons you were doing business with to send money to the Bank in Petosky? A. No.

20 Q. Have you ever asked people you were doing business with to send money to persons in Petosky? A. No.

(Compare this testimony with the testimony of Goetz and Miller, CR pp. 795-9 and 1440-6, wherein they say that at the identical time here involved both the petitioner and the witnesses were sending money directly to the Bank and to other persons in Petosky, Michigan, for deposit in the Bank there to meet checks previously cashed.)

* * * *

20 Q. Have you ever cashed a check in New York City drawn on the Bank in Petosky, Michigan? A. Issued by who?

20 Q. By anybody. A. Yes.

* * *

20 Q. How long ago did you cash the last check? A. Over two years ago.

(This testimony involves the cashing of checks during the period of Stout & Co. transactions at a time when, as appears hereinafter, petitioner was penniless.)

Appendix I

(From examination in supplementary proceedings of September 29, 1939, R. 27, *et seq.*, Government's Exhibit 95-B):

* * *

30 Q. Have you ever made deposits in the account of J. Feldman in the First National Bank? A. Never made a deposit.

30 Q. Have you ever caused a deposit to be made in that account through the medium of another person? A. Yes.

* * *

30 Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman of Petosky, by him to be deposited in the account of J. Feldman, is that correct? A. Yes.

Testimony Concerning Inability of Petitioner to Meet Checks Cashed with Stout & Co.

(From examination in supplementary proceedings of December 16, 1938, R. 13, *et seq.*, Government's Exhibit 95):

14 Q. Is it a fact that you have been subsisting entirely on moneys sent you by your father? A. Of late, yes.

14 Q. When you say of late, what period of time does that cover? A. Within the last year and a half.

14 Q. Would it include the entire period when you were a resident at the Essex House and Navarro Hotel? A. No, because I was making money up until two years ago.

* * *

15 Q. Do you maintain in your own name any brokerage account at the present time in any brokerage house whatsoever? A. No.

(From examination in supplementary proceedings of July 20, 1939, R. 16, *et seq.*, Government's Exhibit 95):

19 Q. When was the last time that you got money of any kind from anybody? About how long ago? A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

19 Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year? A. Outside of help.

19 Q. What help did you get? When and from whom? A. Most of my help was from different members of my family.

(From examination in supplementary proceedings of October 26, 1938, R. 21, *et seq.*, Government's Exhibit 95-A):

22 Q. Have you a bank account? A. I have none.

* * *

23 Q. Do you now maintain a brokerage account in New York? A. I have none.

* * *

23 Q. What is the nature of your business? A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.

23 Q. You are what is called a fur broker? A. Right.

* * *

23 Q. Are there any moneys due from customers to you? A. Haven't been able to do any business for eight months.

25 Q. Is there anybody who owes you money? A. Nobody.

(This testimony was taken at the very time petitioner was cashing checks with Stout & Co. in New York.)

(From examination in supplementary proceedings of September 29, 1939, R. 27, *et seq.*, Government's Exhibit 95-B):

28 Q. So that for the entire duration of this examination, which is approximately one and a half years or thereabouts that (money sent by his father) has been the sole source of your income? A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time. (Matter in parentheses ours.)

(From examination in supplementary proceedings of September 6, 1939, R. 33, *et seq.*, Government's Exhibit 101):

35 Q. Did you file an Income Tax return for 1938? A. Yes.

35 Q. What earnings did you list? A. None.

(How could the Government more clearly and prejudicially prove the petitioner's lack of means at the time he was cashing large checks with Stout & Co.?)

APPENDIX II

SECTION 338, TITLE 18, U. S. CODE

338. (CRIMINAL CODE, SECTION 215.) USING MAILS TO PROMOTE FRAUDS; COUNTERFEIT MONEY. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. §5480; Mar. 2, 1889, c. 393, §1, 25 Stat. 873; Mar. 4, 1909, c. 321, §215, 35 Stat. 1130.)

N. Y. Civil Practice Act Sec. 789:

Privilege of a debtor, party or witness upon examination.

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * * But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination. (Added by L. 1935, ch. 630, in effect Sept. 1, from former §791.)

As amended by L. 1938 ch. 108, in effect March 14, the above section reads as follows:

A debtor, party or witnes examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud * * * but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding, except on a charge or indictment for perjury committed in an examination under this article.